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Supreme Court, U.S.
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No. 00-1345

In the
Supreme Court of the United States

JOBST W.F. BLACHY, et al.,
Cross-Petitioners,

v.

ROSEMARY C. BUTCHER, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONERS' BRIEF IN OPPOSITION TO CROSS-PETITIONERS' CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Respondents/Petitioners oppose the granting of Cross-Petitioners' (except the United States) Conditional Cross-Petition for Writ of Certiorari for the following reasons:

1. **The purchase agreements, and, the deeds from Little Traverse Development Company (LTDC) and/or H.C. Development Company (HCDC) (the development corporations) to insured Plaintiffs were admittedly void under the allegations of the Complaint, giving rise to no cause of action, except reimbursement of the "purchase" moneys. Paragraphs 46, 56, and 93 of the Complaint read:**

> 46. At the time it conveyed title to Plaintiffs or their predecessors by virtue of a warranty deed, Little Traverse Development Co. was not seized with record title to the various condominium units, nor did it have the right to convey or give quiet possession.
>
> 56. At the time it conveyed title to Plaintiffs or their predecessor by virtue of a warranty deed, H.C. Development Co. was not seized with record title to the various condominium units, nor did it have the right to convey or give quiet possession.

> 93. Neither Little Traverse Development Co. nor H.C. Development Co. had marketable title to the units or "the land" at the time they sold condominium units to Plaintiffs or their predecessors.

The purchase agreements and the warranty deeds executed by the development corporations were each void because they were not signed by the true owners of the property described therein. (MCL 566.106.) All of the lower courts agreed with Plaintiffs that the purchase agreements and warranty deeds were void, which is why the insured Plaintiffs were seeking imposition of a constructive trust.

A void contract cannot create any legal or equitable rights in the parties. In *Scott v. Bush,* 26 Mich. 418, 420 (1873), the Court stated:

> "We have held in . . . that a contract void under the statute of frauds, is a mere nullity, and cannot be used for any purpose whatever. And we cannot conceive of such a thing as a contract which cannot be enforced as a contract, and yet can be the foundation of legal obligations arising out of nothing else."

Plaintiffs have no cause of action except for restitution from LTDC and/or HCDC. For more than 100 years, the law in Michigan has been that:

> "The contract set out, being void under the Statute of Frauds, cannot be used as the foundation **of any legal or equitable rights**. If the party pays money under such a void

> contract he may recover it back in assumpsit. (Emphasis Supplied). *Kelly v. Kelly,* 54 Mich. 30, 48 (1884). See also *Thorbahn v. Walker's Estate,* 269 Mich. 586 (1934).

Cross-Petitioners argue (Cross-Petitioners' Brief, p. 4) that, despite the fact that the purchase agreements and deeds were concededly void, that:

> Because the Butchers' acts were wrongful, they had no valid interest in the properties. The condominium owners did not hold a "lien" on the Butchers' title. They owned the property -- bought and paid for. The Butchers had no lawful interest on which to impose a "lien." They owned nothing.

In addition, Cross-Petitioners claim that these void contracts and deeds gave them a cause of action against the United States, in an amount exceeding $100,000, all because they paid moneys to the development corporations. Payment of moneys to a non-owner development corporation, or to any other non-owner entity, could never take the void agreements out of the Statute of Frauds.

The holding in *Kelly v. Kelly, supra*, at page 48, that:

> "The contract set out, being void under the Statute of Frauds, cannot be used as the foundation **of any legal or equitable right.**"

cannot possibly be reconciled with the holdings of the lower courts that the payment of moneys under void purchase agreements, resulting from the negligent record title searches by Lawyers Title, somehow gives rise to an equitable action

against property owned by persons not party to the void contracts.

Respondents/Petitioners mean no disrespect to the lower courts but, using the vernacular, what part of the *Kelly v. Kelly* quoted statement do they not understand? *Kelly* has stood as Michigan law for 115 years and is not likely to be changed anytime soon.

The action is an action on the void purchase agreements (Respondents'/Petitioners' App. 3a-6a); the claimed injury (Respondents'/Petitioners' App. 24a, 64a) is "defective title." The "purchasers" are entitled to recover their money from the "sellers," but there is no Michigan law or Supreme Court decision which remotely suggests that void agreements can give rise to an action against real property owned by others, or, that contracts void under Michigan law can in any way adversely affect a valid United States lien against real property located in Michigan.

MCL 566.106 reads:

> "Section 6. No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing."

A claim arising out of a void agreement does not create an interest in real property by operation of law.

The district judge (Respondents'/Petitioners' App. 48a) apparently held that the deeds to the insured Plaintiffs were valid because they "were signed by LTDC and HCDC, from whom Plaintiffs purchased the property." If this is a correct interpretation of Michigan law, then the constructive trust proceedings and declaration were entirely unnecessary. There is no Michigan statute or appellate case which could validate the deeds from the corporations. There is no claim that the corporations were authorized in writing to sign the deeds on behalf of Alexander or Rosemary.

The 6th Circuit panel disposed of Petitioners' arguments (Respondents'/Petitioners' Brief, pp.27-28) that the deeds from the corporations were void under the Statute of Frauds as "totally without merit" (Respondents'/Petitioners' App. 29a), without further explanation.

2. The District Court had no subject matter jurisdiction over the action because the priority claims over the government tax liens were not ripe. Fed. R. Civ. P. 12(h)(3) provides:

> (3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Cross-Petitioners' pleaded claim against Respondents/Petitioners is that they are entitled to the relief of imposition of a constructive trust, or, in the alternative,

damages, against or from one or more of the Petitioners. No federal question is involved in the constructive trust count or in any of the other eight counts of the Complaint. Cross-Petitioners' pleaded claim against the Internal Revenue Service (IRS) is that, **if Cross-Petitioners obtain constructive trust relief**, they are entitled to priority over the IRS joint tax liens, as to Alexander's interest in the 17.83 acres at issue. They make no claim of entitlement to priority should they not obtain constructive trust relief.

The validity of the IRS joint tax liens is not challenged by Cross-Petitioners. Both they and the United States have filed claims against the entireties property in Rosemary's Bankruptcy case. 28 U.S.C. § 1334(e) provides:

> "(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate."

Surely, the Eastern District Bankruptcy Court, and not the Western District Court, has exclusive jurisdiction over the entireties property and Rosemary's right of survivorship.

The proper (and exclusive) forum for resolving a dispute between claimants as to property listed in a bankruptcy estate is the Bankruptcy Court. The 6th Circuit Court held (Respondents'/Petitioners' App. 17a) that there was no doubt that Rosemary's entireties interest in the 17.83 acres became part of her bankruptcy estate upon filing, so, Cross-Petitioners are arguing that Alexander's entireties "interest" **is not** subject to the **joint liens**, but that Rosemary's entireties "interest" **is** subject to the joint liens.

Neither the IRS nor the United States are necessary or proper parties to the constructive trust action. No petitioner is a necessary party to the priority action against the IRS, but Cross-Petitioners cannot assert priority over the IRS liens until they first obtain a judicial determination that they are constructive trust beneficiaries as of a particular date. Since the Bankruptcy Court was held not to have the power to impose a constructive trust in *Re: Omegas Group,* 16 F.3d 1443 (6th Cir. 1994), venue of the constructive trust claim should have been transferred back to the state court for determination.

The holding by the 6th Circuit (Respondents'/Petitioners' App. 22a-23a) that "the bankruptcy court can share its jurisdiction" on the constructive trust claim is puzzling. If the Eastern District Bankruptcy Court had no power to impose a constructive trust, then the Western District Court could not, through a change of venue, acquire jurisdiction to impose a constructive trust by "sharing" the Eastern District Court's non-existent power. The two district courts have exactly the same authority.

In any event, there was no Federal Court jurisdiction over the matter because, on October 16, 1991, the suit filing date, the priority claim was not ripe. The void deeds did not create a cause of action against the government or against Alexander. In *Texas v. United States,* 118 S.Ct. 1257, 1259 (1998), this Court stated:

> "A claim is not ripe for adjudication if it rests upon "contingent future events that may not occur as anticipated or indeed may not occur at all" *Thomas v. Union Carbide Agricultural Products Co.,* 473 U.S. 568, 581, 105 S.Ct. 3325, 3333, 87 L.Ed.2d 409 (1985) (quoting

> 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure Sec 3532 p 112 (1984))."

The holding of the 6th Circuit is that it was Rosemary's bankruptcy filing on March 1, 1991, which divided or separated the entireties interest of the couple into two interests. On the prepetition lien filing dates and on the prepetition "sales" dates, the real property was unquestionably, immediately before each event, held by Alexander and Rosemary as tenants by the entireties.

But for the Chapter 7 filing, under the 6th Circuit's ruling, Plaintiffs below could not have acquired a constructive trust against Alexander's interest. *See Craft v. United States (Craft I)*, 140 F.3d 638, (6th Cir. 1998), *affirmed by Craft v. United States (Craft II)*, 233 F.3d 358 (6th Cir. 2000).

Cross-Petitioners sought a constructive trust only over Alexander's interest. Under the 6th Circuit's rulings, he had no individual prepetition interest over which a constructive trust could be imposed. Syllabus 9 of *Craft II* reads:

> "When state law provides that there can be no individual interest in property held in a tenancy by the entireties, there is nothing which can be deemed "property" or "rights to property" under the federal tax lien statute 26 USCA § 6321 ."

Nothing in this record would support Cross-Petitioners' argument that their priority claim against the United States relates back, based upon the filing and/or on postfiling events. They asserted only individual claims against Alexander's "interest."

The sole question presented to this Court by Cross-Petitioners supports Respondents'/Petitioners' argument. Cross-Petitioners ask:

> May the lien of the Internal Revenue Service for taxes unpaid by Alexander and Rosemary Butcher be satisfied by sale of the property owned by Cross-Petitioners and held in constructive trust by the Butchers, **when the Butchers have been judicially determined to own only bare legal title and no beneficial interest?** (Emphasis added).

Cross-Petitioners can make no legitimate claim of priority over a valid recorded joint federal tax lien until such time as they secure a final "judicially determined" judgment of entitlement against Alexander, individually, which they could not obtain during the entireties tenancy. Until then, there could be no possible federal court jurisdiction.

3. Cross-Petitioners' suit became moot when they failed to timely substitute a proper party for Alexander, after his death.

This issue is covered, as to Respondents/Petitioners, in their Argument 5. (Respondents/Petitioners Brief, p. 22.) In their Brief in Opposition (pp. 4-5), Cross-Petitioners drop all claims that they substituted a proper party for the deceased, and rely solely on the provisions of Fed. R. Civ. P. 25(c), which permits continuances of an action, in case of a transfer of interest, against the original party. Rule 25(c) does not purport to authorize continuance of an action against a decedent.

4. The District Court had no jurisdiction because the 17.83 acres were owned by Alexander and Rosemary by the entireties at the time of each claimed "sale" by the development corporations and were, therefore, exempt from execution on claims of parties who were not joint creditors of the couple.

No Cross-Petitioner claims to be a joint creditor of Alexander and Rosemary out of any unit "purchase" from LTDC or HCDC. The United States is admittedly a joint creditor of the couple. (Cross-Petitioners' Brief, p. 2.) The Conditional Cross-Petition brings the matter back full circle to October 16, 1991, the suit filing date. If the entireties property is exempt from claims of non-joint creditors under Michigan law, how can an individual claimed creditor obtain a cause of action against the entireties property by entering into a void contract with a corporation non-owner?

Just as the individual Cross-Petitioners, by this suit against Alexander's interest, seek priority over the joint liens of the IRS, they seek priority over the claims of all other bankruptcy court listed joint creditors, and they seek priority over Rosemary's claims to that portion of the property exempt under both state and bankruptcy law, despite centuries of legal decisions that individual (claimed) creditors of one entireties tenant cannot levy upon the property. (Respondents'/Petitioners' App. 18a.)

Cross-Petitioners seek to get around Michigan law, that "neither husband nor wife acting alone can alienate any interest in the property . . . ", and the Statute of Frauds, by claiming that something which Alexander supposedly said in

1978 gave rise to multiple constructive trusts in 1981-1987. The 6th Circuit held that it was Rosemary's Chapter 7 filing in 1991 which split and alienated the single entireties interest of the couple (Respondents'/Petitioners' App. 67a), not the prepetition unit "sales."

The District Court (Respondents'/Petitioners' App. 66a) and the 6th Circuit panel (Respondents'/Petitioners' App. 20a) each held that the entireties tenancy was terminated on October 30, 1991, so October 31, 1991 was the earliest date that any Cross-Petitioner could assert an individual claim against Rosemary and the property. At that point, Alexander's claimed creditors lost all possible chance of proceeding against the property.

11 U.S.C. § 522 (c) provides in pertinent part:

> "(c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case . . . "

On page 3 of the Cross-Petition, it is claimed:

> "Under Michigan property law, a constructive trust arises upon the wrongful conduct of a party and immediately defines the wrongdoer's interest in the property. In this case, the Butchers were constructive trustees. They had no ownership interest, no equitable interest, to which the 1988 tax lien could attach."

On page 4 of the Cross-Petition, Cross-Petitioners state:

> "Michigan courts have consistently held that the events giving rise to a constructive trust cause a split in the title of the subject property, immediately altering the nature of the wrongdoer's interest in the property. The wrongdoer holds only one of two independent titles to the property, legal title, while equitable title is vested in the party wronged."

Of course, these statements conflict with the holdings of both lower courts that a division of interests occurs upon the filing of a bankruptcy petition by one spouse; that the filing does not terminate the entireties' tenancy; and that Rosemary in fact had an interest, which "no doubt" (Respondents'/Petitioners' App. 17a) became part of her bankruptcy estate. Whatever Cross-Petitioners claim is against Rosemary, it most certainly "arose or was determined under Section 502" to have arisen before commencement of her case, and, neither lower court has held that the property which was listed in Rosemary's estate, is not exempt.

CONCLUSION

Cross-Petitioners claim entitlement to the condominium units, which 12 of them "bought and paid for" (Cross-Petitioners' Brief, p. 4), only they did not buy them from the owners of the units, and they did not pay their money to the owners of the property.

It is impossible, under Michigan law, to acquire any interest in real property out of warranty deeds not signed, as grantors, by both entireties tenants. The deeds and the purchase agreements are void.

There are no exceptions to the rule. None have been cited by Cross-Petitioners, or by the lower courts. The purchase agreements and deeds are void because they were not signed by the owners; any claim of an oral agreement is void because it is not in writing. Cross-Petitioners and the lower courts adamantly refuse to accept Michigan law on the point.

/s/_____
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